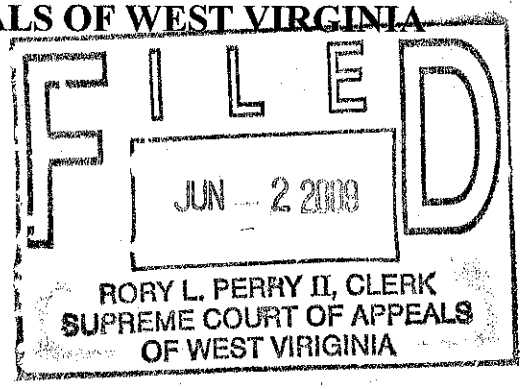
No. 34720

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



IN RE THE MARRIAGE OF:

BRENDA DIANNE WARE,

Petitioner Below,
Appellee,

v.

DAVID GARY WARE,

Respondent Below,
Appellant.

Family Court No. 05-D-351-4
(Harrison County)

BRIEF OF APPELLEE AND CROSS ASSIGNMENTS OF ERROR

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I. INTRODUCTION

Appellee Brenda Dianne Ware submits her Brief and Cross Assignments of Error herein pursuant to the provisions of Rule 10 of the West Virginia Rules of Appellate Procedure. At the outset, Appellee avers that Rule 4A of the Rules of Appellate Procedure permits a party to set forth a statement of all facts pertinent to the issue raised in lieu of a transcript. However, Rule 4A(c) requires the party's attorney to confirm that "the facts alleged are faithfully represented and that they are accurately presented to the best of his ability." Appellant David Gary Ware has not filed any transcripts nor has his attorney filed any required certificates.

The final hearing in the divorce on the merits before the Family Court on August 4, 2006, inadvertently was not properly recorded. Therefore, there is no record of that hearing. Appellee has caused a transcript of other relevant hearings on December 16, 2005 and December 7, 2007 to be prepared and filed. Her attorney files herewith the proper certificate as to other facts alleged to which there is no transcript.

II. OMISSIONS OR INACCURACIES IN APPELLANT'S STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the Rules of Appellate Procedure, Appellee points out the omissions or inaccuracies in Appellant's "Statement of Facts," as follows:

1. Appellant omits that Appellee did not see the first draft of the Antenuptial Agreement[1] until February 10, 1993, the day before it was signed, when she was first told that Appellant wanted her to sign it. (Tr., December 16, 2005, pp.6, 40-41, 48, 49)

2. Appellant omits that when Appellee was first told of the Antenuptial Agreement on February 10, 1993, she had already paid for her wedding dress and the honeymoon. She was

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[1] This document is actually titled "Ante-Nuptial Agreement," but shall be referred to as "Antenuptial Agreement" throughout Appellee's Brief and Cross Assignments of Error.

surprised, but felt she had no choice because Appellant told her he would not marry her if she did not sign it. (*Id.*, p. 41)

3. Appellant omits that on February 11, 1993, the next day after Appellee first saw the draft of the Antenuptial Agreement, she went with Appellant to Attorney Skeen's office to sign it without being advised of her right to an independent attorney, nor to even discuss the Antenuptial Agreement outside the presence of Appellant. (*Id.*, pp. 39, 49, 62-63, 68)

4. Appellant erroneously asserts on pages 6 and 7 of his "Statement of Facts" that Family Court Judge Wilfong stated and found in the "Order Regarding Antenuptial Agreement" that the parties "were aware" of what was the subject matter of paragraph 2. This assertion is not entirely accurate. The Judge stated at the hearing regarding the Antenuptial Agreement: "In fact, there was no franchise. But the Court finds there was a meeting of the minds. Everybody knew what the parties were talking about." (*Id.*, p. 77)

5. Appellant omits that no financial disclosures were exchanged between the parties before they signed the Antenuptial Agreement and that Appellee did not know what Appellant owned for assets or owed debts, nor did Attorney Keith Skeen, who prepared the Agreement. (*Id.*, pp. 39, 55, 69-70)

6. Appellant omits that his testimony that he "NEVER" saw the Antenuptial Agreement until the day it was signed, is rebutted by Appellee and Keith Skeen, the attorney who prepared the Agreement. (*Id*, pp. 6-7, 13, 40,)

7. Appellant omits that Appellee stated she did not know what the Appellant owned, outside of household contents, at the time they entered into the Antenuptial Agreement. Therefore, she

believed he owned a franchise as stated in the Antenuptial Agreement. (*Id.*, pp. 39-41, 45, 48-49, 52-53, 55)

8. Appellant omits that the Appellee stated she believed the use of the word "franchise" referred to something "like a McDonalds," and that Attorney Skeen stated he used the word "franchise" when he prepared the Agreement because that was what he was told to do by Appellant. (*Id.*, pp. 41, 60, 64, 67)

9. Appellant omits that Appellee had less than 24 hours from the date (February 10, 1993) that she saw the first draft of the Antenuptial Agreement to the date (February 11, 1993) that she signed it. (*Id.*, pp. 40, 49)

10. Appellant erroneously asserts that Attorney Keith Skeen "knew" the parties through his being a customer "at The Pizza Place and at a candy store at said Mall named 'Sweets and Treats', which store Ms. Ware managed for a relatively short time period prior to the parties' marriage." This assertion is totally contrary to the evidence which is that **after** the parties married, they and Mr. Geraffo started a subsidiary of The Pizza Place of Bridgeport, Inc. named "Sweets and Treats." It was treated as Appellee's business because she managed it, but all income and expense was reported under the name of The Pizza Place of Bridgeport, Inc. The three persons decided to shut it down five years later after the lease expired. (*Id.*, pp. 22-24, 43-44) At that time, Appellee was pregnant with the parties' second child. These corrected facts are important because (A) they show the early direct post-marital involvement of Appellee in the operation of The Pizza Place of Bridgeport, Inc. and (B) they demonstrate the unreliability of Appellant's factual assertions.

11. Appellant erroneously states as a fact at page 7 of his Brief that once he and Appellant decided to marry, he "wanted to protect himself and his co-owner . . . from any rights which Brenda

Ayers could claim regarding the subject Pizza Place business." Appellant's statement contradicts his testimony and the testimony of his Attorney, Keith Skeen, which is that (A) Appellant's business partner, John Geraffo, and Appellant wanted the Antenuptial Agreement to protect any *franchise* in the event of death or divorce and (B) at that point in time, there was no franchise. (*Id.*, pp. 7, 9-10, 14). Attorney Skeen was very clear that he expressly used the word "franchise" because that was the information provided to him. (*Id.*, p. 67) The Court is being misled by the more vague word "business" now being substituted by Appellant for the word "franchise" which was the word employed in the Antenuptial Agreement, at his request.

12. Appellant omits that after the parties married, other corporations were started generally known as "Primo Pizza" located in North Carolina and South Carolina. (*Id.*, pp. 15-17, 19, 21) He also omits that he traded his interests in these corporations as part of the consideration to acquire the 51 percent interest of John Geraffo in The Pizza Place of Bridgeport, Inc. in 2001. The parties borrowed from a line of credit on their house to pay the balance of the consideration. There were no other corporations named "The Pizza Place". (*Id.*, p. 17; Pet. Ex. A., August 4, 2006; Resp. Exhibit B, August 4, 2006)

13. Appellant omits that Mr. Skeen remembered Appellee working part-time at The Pizza Place of Bridgeport, Inc., even before the parties married. (*Id.*, p. 57)

14. Appellant omits that in the mediated agreement titled Memorandum of Understanding, dated October 19, 2005, which the parties reached after the divorce petition was filed regarding "all other items of marital property," all other assets acquired during the marriage in Appellant's name; in Appellee's name; or in their joint names were treated as marital. This included an investment account in her name only; an investment account in his name only; and a 50 percent interest in

Appellant's name only in a company called "Devali's, dba The Cool Spot, Inc." (*See*: Exhibit Mediated Agreement) Moreover, he omits that he testified the Antenuptial Agreement was not intended to apply to any assets acquired during the marriage other than the "franchise." (*Id.* p. 29)

15. Appellant erroneously asserts as a fact in the case at page 10 of his Brief that an attorney may act as the lawyer for both parties in the formation of a contract when they do not have independent counsel. There is no testimony to support this assertion and neither the Family Court nor the Circuit Court made such a finding as a matter of law in any of the orders entered in the case. This is merely an argumentative assertion of Appellant to try to avoid the problematic difficulty of the bias of Keith Skeen, the attorney who represented him and was paid by him in the preparation of an Antenuptial Agreement.

16. Appellant notes at page 12 of his Brief that Appellee was only 22 years old, had a high school diploma and a two-year degree as an x-ray technologist when this Antenuptial Agreement was presented to her, but he omits that she stated there was a lot of the agreement she did not understand. She stated that she signed it because she loved him; she believed they would stay together, and that the marriage would not end. (*Id.*, pp. 42, 47) Given the extensive litigation in this case, it is absurd to assert that Appellee "understood" the Antenuptial Agreement, as he now wishes it construed.

17. Appellant erroneously asserts at page 11 of his Brief that "there was not a complete disclosure of the value of the parties' respective assets and debts." In fact, there was no disclosure of the identity or the value of assets and debts prior to the making of the Antenuptial Agreement. (*Id.*, p. 39, 60, 69-70)

18. Appellant erroneously asserts at page 11 of his Brief that "[t]he only property matter in issue is the marital value of The Pizza Place of Bridgeport business." The issues are and were: (1)

characterization of the ownership of The Pizza Place of Bridgeport, Inc. as of the date of separation August 25, 2005; (2) valuation of the marital asset The Pizza Place of Bridgeport, Inc., or the marital component if the facts dictated such; and, (3) a determination of whether or not the valuation mandates of *Mayhew v. Mayhew*, 519 S.E.2d 188 (W.Va.1999) needed to be implemented if The Pizza Place of Bridgeport, Inc. was entirely the separate asset of Appellant, or a percentage of the ownership was a separate asset of Appellant.

19. Appellant omits that since February 20, 1993 (the date of marriage which was ten days after the Antenuptial Agreement was signed), there has been a significant change in the parties' circumstances, to-wit: Appellee had no independent full time employment after she gave up her career as an x-ray technologist to run "Sweets and Treats"; at the date of separation, Appellee was a part-time hot lunch coordinator; during the marriage there were three children born to the parties; namely, Megan McKenzie Ware, born June 14, 1997; Cody David Ware, born June 20, 1999; and Madison Paige Ware, born January 3, 2002; the parties started a subsidiary of The Pizza Place of Bridgeport, Inc. (Sweets and Treats), which was operated by Appellee; during the marriage, Appellee worked periodically at The Pizza Place of Bridgeport, Inc. without pay; the parties acquired more assets (including businesses); the parties incurred debt in 2001 on the last marital home to finance the acquisition of John Geraffo's interest in The Pizza Place of Bridgeport, Inc., and, Appellant started other corporations which he dissolved during the marriage or he dissolved shortly after Appellee filed for divorce. (*Id.*, pp. 15-21)

20. Appellant omits that Appellee testified that there were two sets of books as to the income from The Pizza Place of Bridgeport, Inc.: one set that Appellant showed to the landlord (Meadowbrook Mall) which based the rent on a percentage of the gross income, and the other set

was his true cash unreported income. Appellant did not deny this in his testimony at the final hearing.

21. Appellant omits that he failed to present any evidence to corroborate his assertion that he owned a 49 percent interest in The Pizza Place of Bridgeport, Inc. as of the date the parties married.

22. Appellant omits that the 51 percent interest in The Pizza Place of Bridgeport, Inc., which the parties purchased during the marriage in 2001, was not a purchase of a franchise.

23. Appellant omits that Appellee's expert, Donald Conley, testified as to the value of the corporation during the divorce trial and that his valuation was adopted by the Family Court for a variety of reasons as detailed in the divorce decree. Appellant appealed this issue, but the ruling of the Family Court as to the value of The Pizza Place of Bridgeport, inc. was not overruled by the Circuit Court. It was re-adopted by the Circuit Court in the Final Order which was entered on April 11, 2008.

24. Appellant omits that on the second remand to the Family Court, he hired a new expert (Mickey Petitto) to present a value of the 51 percent interest in The Pizza Place of Bridgeport, Inc. who, by her own testimony, predominantly values real estate and in the last ten years has only valued twenty business at most that did not own real estate. (Tr., December 7, 2007, pp. 45, 52)

25. Appellant omits that during the hearing on the second remand as to the valuation of the 51 percent interest in The Pizza Place of Bridgeport, Inc., his expert, Mickey Petitto, admitted to the following with regard to preparation of her valuation report:

A. She applied a minority discount to the valuation while admitting the 51 percent interest gives one control over business decisions (*Id.*, pp. 59-60, 81);

B. The gross receipts for The Pizza Place of Bridgeport, Inc., as reflected in the 2006 tax return were $400,000. and dropped in 2005 (year of separation of the parties) due to an expense that she found to be extraordinary for legal expense (*Id.*, p. 72);

C. The corporate income is stable (*Id.*, pp. 72-73);

D. She applied a 30 percent fragmented interest discount of the value of 20 percent for lack of marketability relying on adjustments commonly made for valuing real estate (*Id.*, pp. 77-80);

E. She concluded the impairments to the value are "obvious" again citing an authority for valuing real estate (*Id.*, p. 82), and

F. She was hired one month before she testified and prepared her report the day before the hearing. (*Id.*, p. 83)

26. Appellant omits that during the hearing on the second remand his expert admitted that, contrary to her written report, a 51 percent ownership in a corporation gives one the controlling interest in the corporation. (*Id.*, p.81) Nevertheless, his expert still asserted it should be discounted.

27. Appellant omits that Donald Conley, Appellee's expert, stated that because a 51 percent interest gives the buyer a controlling interest in the pizza business, based on applicable IRS valuation procedures, it should be valued higher than an interest which does not give a controlling interest. (Id., pp. 9, 14-16, 30)

28. Appellant asserts in error that Family Court Judge Wilfong (as well as Circuit Court Judge James Matish, in affirming) ignored the opinions of his expert, Ms. Petitto. Simply because his expert's opinion was not accepted does not mean it was ignored. Ms. Petitto revalued the business even though the Family Court's adoption of Mr. Conley's value of the business had already been accepted and not previously reversed on appeal. The Family Court permitted her testimony

over the objection of Respondent. (*Id.* pp. 43, 53) Clearly the Family Court heard and considered Ms. Petitto's opinion, testimony and report.

29. Appellant omits that on cross-examination, his expert, Ms. Petitto, admitted that many of her assumptions and opinions were based on valuing real estate, not a pizza business that owns no real estate. Specifically, on page 3 of her report in the second and third full paragraphs, she conceded her opinions relate to real estate, not a business, and she had no authority to cite for her opinion in the fourth paragraph that an "undivided fractional interest in the property, whether it is 1% or 99% . . . is considered as a minority interest." In fact, she recanted her written opinion on page 4, while testifying and admitted that a 51 percent interest in a business does give control over the business. (*Id.*, pp. 77-82)

30. Appellant omits that the lower courts consistently adopted the expert opinion of Brenda Ware's expert, Donald R. Conley, but denied Ms. Ware's request for his fees in the amount of $600 for his Court appearance on December 7, 2007, as well as his previous fees of $3,100 for the preparation of his report and presenting his testimony at the final hearing August 4, 2006. It is now clear that Appellant has run his expenses through the pizza business, but Appellee has no ability to access this asset for a similar channel to direct her expenses. (*Id.*, p. 72)

31. Appellant omits that Ms. Ware submitted as her exhibit on December 7, 2007, a letter to Judge Wilfong dated October 17, 2007, which summarized her detailed attorney's fees to date of $21,240.70. (*Id.*, pp. 34-35)

32. Appellant omits that by proffer, Appellee placed on the record that she had incurred additional attorney's fees on the second remand issues of $1,665 and expert fees for Mr. Conley of $600.00. (*Id*, pp. 34-35)

Appellee also references herein the Statement of Facts set forth below in Appellee's Cross Assignments of Error.

III. STATEMENT TO MEET ALLEGED ERRORS

Without waiving her Cross Assignments of Error, Appellee states as follows:

A Assuming *arguendo* that the Antenuptial Agreement is valid and enforceable to preclude 49 percent interest in The Pizza Place of Bridgeport, Inc. in equitable distribution, the final Order should be affirmed that the 51 percent interest in The Pizza Place of Bridgeport, Inc, purchased during the marriage, is marital because there is no language in the Agreement to exclude property acquired after the marriage by the expenditure of marital funds and it is neither fair nor reasonable to exclude the 51 percent interest as a marital asset.

B. Assuming *arguendo* that the Antenuptial Agreement is valid and enforceable to preclude from equitable distribution assets acquired in each party's separate name after the marriage, Appellant clearly waived this application to the 51 percent interest in The Pizza Place of Bridgeport, Inc., or is estopped from asserting this, because of his conduct in signing the Memorandum of Understanding after the divorce petition was filed whereby assets acquired in his separate name during the marriage were treated as marital.

C. The lower court's value of the 51 percent interest in The Pizza Place of Bridgeport, Inc., acquired during the marriage, is supported by credible evidence because it was calculated by a qualified expert who applied a well recognized valuation methodology to value the corporation as well as the 51 percent interest therein, and therefore should be affirmed.

IV. STANDARD OF REVIEW

This Court recently stated in *Howell v. Goode*. 674 S.E.2d 248 (W.Va. 2009) that in establishing a standard of review for examining a lower tribunal's rulings, this Court has consistently held as follows:

> In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. [**8] We review questions of law *de novo*.

V. ARGUMENT

A. ASSUMING *ARGUENDO* THAT THE ANTENUPTIAL AGREEMENT IS VALID AND ENFORCEABLE TO PRECLUDE 49 PERCENT INTEREST IN THE PIZZA PLACE OF BRIDGEPORT, INC. IN EQUITABLE DISTRIBUTION, THE FINAL ORDER SHOULD BE AFFIRMED THAT THE 51 PERCENT INTEREST IN THE PIZZA PLACE OF BRIDGEPORT, INC, PURCHASED DURING THE MARRIAGE, IS MARITAL BECAUSE THERE IS NO LANGUAGE IN THE AGREEMENT TO EXCLUDE PROPERTY ACQUIRED AFTER THE MARRIAGE BY THE EXPENDITURE OF MARITAL FUNDS, AND IT IS NEITHER FAIR NOR REASONABLE TO EXCLUDE THE 51 PERCENT INTEREST AS A MARITAL ASSET.

The Antenuptial Agreement dated February 11, 1993, has no language in the event of a divorce relating to the exclusion of property acquired by the parties after marriage by the expenditure of marital funds or by work performed by one or both of them;

Moreover, because an antenuptial agreement is treated as a separation agreement in the event of a divorce, pursuant to the "fair and reasonable" standard set forth in West Virginia Code § 48-6-201, the 51 percent interest in The Pizza Place of Bridgeport, Inc. purchased in 2001 should be identified as a marital asset subject to equitable distribution.

A review of the Antenuptial Agreement reveals no paragraphs that identify how property or equity in property acquired by the parties after their marriage with marital money or by marital work is to be treated in the event of a divorce. The preamble to the Antenuptial Agreement consists of various "whereas" paragraphs which are usually known as "recitals." It is well settled law in West Virginia that if there is any inconsistency between the obligatory part of the contract and the recitals therein, effect will be given to the obligatory part rather than to the recitals. *See* Michie's Jurisprudence (Vol. 4A) § 48 Contracts, p. 452 (1999) and *Martin v. Rothwell*, 95 S.E. 189 (W.Va. 1918) The third "whereas" paragraph states that the parties "desire the release of, after the solemnization of their marriage, all rights that either . . . might or could have, by reason of the marriage, in the property of the other which either now has or may hereafter acquire, in the respective estate of either upon his or her death." Clearly, "death" does not apply to "divorce."

A similar analysis arises with the fourth, fifth, and sixth "whereas" paragraphs.

The seventh "whereas" paragraph asserts that each party is desirous of "relinquishing any monetary benefits that might be obtained by institution of legal proceedings for dissolution of the marriage." However, unless specific language is in the obligatory part of the contract a "desire" is not enforceable as a contract.

Paragraph No. 1 of the obligatory part of the agreement relates to the real estate identified as "owned jointly" and expressly states that "in the event of a divorce between the parties hereto, said residence shall become marital property, including any increases in value, whether active or passive." However, the fact is the parties did not own real estate jointly until it was conveyed to them by deed dated February 19, 1993 (one day before marriage). It did not go on record until after they were married. Both parties admit they did not own real estate jointly when the contract was

signed. (Tr., December 16, 2005, pp. 37-38, 42) Mr. Skeen, the attorney who prepared the Antenuptial Agreement, thought the parties did own real estate jointly *(Id.*, p. 70) Clearly this paragraph must be disregarded as having no impact on their rights in the real estate they acquired after they were married. Neither party disputes this.

Paragraph No. 2 clearly identifies the subject matter of a "franchise" and that Petitioner waives her rights to a "Pizza Place franchise" and any future acquisitions of franchises, but it has no language as to the parties' rights vis à vis the alleged franchise in the event of a divorce. Moreover, the fact that no franchise existed then, or was created later as contemplated, is not a basis to apply new wording to the contract which is contrary to the language used. Appellant testified that actually no franchise existed but that he and his partner "planned to create one" and that is why the paragraph was written (*Id*, p. 33). Mr. Ware admitted the main concern for him was the anticipated franchise to be created by him and his partner (*Id*, p. 29). On its face, this paragraph, like the first paragraph, has no impact on the rights of the parties to the real assets as of the date of separation in a divorce case.

Paragraph No. 3 relates only to the mutual waiver of dower or curtesy in real property. This has no relevance to equitable distribution in the divorce case.

Paragraph No. 4 relates to each party's owning all personal property that each "now owns or may hereafter acquire free from any claim on the part of the other spouse . . . and . . .the right of each spouse hereto to transfer, assign and set over any of his or her personal property free from any such claim by the other spouse." There is no language as to the parties' respective rights in the event of a divorce. The language relates only as to the right of each party to transfer, assign, and set over property free of claim of the other spouse.

Paragraph No. 5 relates to consideration. There is no language in this paragraph as to the parties' rights in the event of a divorce.

Paragraph No. 6 is titled "Release of Marital Rights" but the language in this paragraph clearly relates to the release of marital rights of each party as "surviving spouse." There is no reference to the rights of each spouse in a divorce action, only as a spouse who survives the other.

Paragraph No.7 is titled "Obligations." Technically, if this paragraph is to be applied in the divorce action, then all debt in Appellant's name is his debt. The paragraph never addresses how to treat debt AFTER they married. All reference to debt is to debt in the names of David Gary Ware and Brenda Dianne Ayers. Nor does this paragraph address issues in the divorce case such as debt of the businesses for which the jointly owned marital house was used as collateral, or the $10,000 Appellant took from their joint account and put into the account of The Pizza Place of Bridgeport, Inc. This paragraph does not purport to relate to divorce issues or rights.

Paragraph No. 8 is titled "Disclosure of Facts." Appellee does not waive her assertion that (1) there was no disclosure of facts; (2) she did not have adequate knowledge of Appellant's "extent and probable value of his estate," or that (3) she did not know "all of the rights conferred by law upon each in the estate of the other." This was her testimony. (*Id.* pp. 39, 41, 45) Appellant contradicted himself by first saying all the assets were joint and then saying there were no joint assets. (*Id.*, pp. 11-12) Then, he admits there was no franchise, just an "intent" to form a franchise. (*Id*, pp. 13, 33) He admits there is nothing in the Antenuptial Agreement that refers to any corporation. (*Id.* p. 14)

Clearly, Paragraph No. 8 does not contain any language as to each party's respective rights in the event of a divorce, and there is no disclosure of the identity of what business interests Appellant owned or the value of the business interests, if any.

The remaining paragraphs numbered 9, 10, and 11 are likewise of no importance to the divorce case. Thus, the 11 "obligatory" paragraphs in the Antenuptial Agreement either do not relate to the event of a divorce and/or the subject matter clearly identified did not exist.

West Virginia Code § 48-1-233 defines marital property to include all property and earnings acquired by either spouse during a marriage and the amount of any increase in value in the separate property of either of the parties to a marriage which results from (1) an expenditure of funds which are marital property or (2) work performed by either or both of the parties during the marriage.

Pursuant to West Virginia Code § 48-7-101, the court is required to divide the marital property "equally between the parties."

West Virginia Code § 48-6-101(b) states that "To the extent that an antenuptial agreement affects the property rights of the parties or the disposition of property . . . after a divorce . . . the antenuptial agreement is a separation agreement."

West Virginia Code § 48-6-201(a) states with regard to a separation agreement, as follows:

> [I]f the court finds that the agreement is fair and reasonable, and not obtained by fraud, duress, or other unconscionable conduct by one of the parties, and further finds that the parties, through the separation agreement, have expressed themselves in terms which, if incorporated into a judicial order, would be enforceable by a court in future proceedings, then the court shall conform the relief which it is authorized to order under the provisions of parts 5 and 6, article 5 of this chapter to the separation agreement of the parties.

Thus, even if the antenuptial agreement is valid it still must pass the "fair and reasonable" test to be applied by the divorce court.

The "franchise" referenced in paragraph number 2 was contemplated to be created but that never happened, so the "franchise" did not exist as of the date of the agreement nor as of the date of separation. It is neither fair nor reasonable for the court to try to conform relief to this paragraph as it cannot be performed for lack of an existing asset!

Nor is it "fair or reasonable" to construe paragraphs 4 or 6 to preclude the 51 percent interest purchased by the parties in The Pizza Place of Bridgeport, Inc., or the 50 percent interest purchased by the parties in Davali's LLC dba The Cool Spot. Marital money was invested to acquire these assets, and work by one or both spouses helped to grow these interests. Appellant has already conceded that Devali's LLC, dba The Cool Spot is marital. Accordingly, there is no basis in fact, law or equity to reject the 51 percent interest in The Pizza Place of Bridgeport, Inc.

Before the 2001 "buy out" of the 51 percent share of John Geraffo in The Pizza Place of Bridgeport, Inc., Appellant admitted that there had been a subsidiary of the corporation "that belonged to Brenda" called "Sweets and Treats," and that this business was started after the parties married in the summer of 1993. (Tr., December 16, 2005, p. 24) Appellee asserted that she gave up her career to run the candy store and that she, David Ware, and John Geraffo all decided not to renew the lease when it expired on the candy store five years later. (*Id.*, p. 43)) At this point, the income from Appellee's business – which was a subsidiary – had clearly become part of and commingled with The Pizza Place of Bridgeport, Inc. Moreover, there are no stock certificates as to the 51 percent interest (nor for the 49 percent interest). And there is no evidence that the 51 percent interest was placed solely in Appellant's name as he asserts. Therefore, at a minimum, the 51 percent interest in The Pizza Place of Bridgeport, Inc. is clearly a marital asset.

B. ASSUMING *ARGUENDO* THAT THE ANTENUPTIAL AGREEMENT IS VALID AND ENFORCEABLE TO PRECLUDE FROM EQUITABLE DISTRIBUTION ASSETS ACQUIRED IN EACH PARTY'S SEPARATE NAME AFTER THE MARRIAGE, APPELLANT CLEARLY WAIVED THIS APPLICATION TO THE 51 PERCENT INTEREST IN THE PIZZA PLACE OF BRIDGEPORT, INC., OR IS ESTOPPED FROM ASSERTING THIS APPLICATION, BECAUSE OF HIS CONDUCT OF SIGNING THE MEMORANDUM OF UNDERSTANDING AFTER THE DIVORCE PETITION WAS FILED WHEREBY ASSETS ACQUIRED IN HIS SEPARATE NAME DURING THE MARRIAGE WERE TREATED AS MARITAL.

Because of the signed Memorandum of Understanding reached by the parties on October 19, 2005, after the divorce was initiated, wherein assets purchased during the marriage, including assets titled only to one party or the other, were agreed to be marital assets and included in the division of assets, and because of other conduct, the Respondent waived and/or is estopped from asserting the provisions of paragraphs 4 and 6 of the antenuptial agreement to defeat equitable distribution.

Syllabus Point 1, *Beall v. Morgantown & Kingwood R. Co.*, 190 S.E. 333 (W.Va. 1937) states: "Where, with full knowledge of his rights, the conduct of a party to a contract is wholly inconsistent with reliance on the contract, he will be deemed to have waived his rights thereunder." *See* Michie's Jurisprudence (Vol. 4A), Contracts § 56 (1999): "A waiver to operate as such must arise by contract or estoppel..."

In the case *sub judice*, the written, signed, Memorandum of Understanding entered into by Appellant, with advice of counsel, is clear evidence of his waiver of the Antenuptial Agreement provisions as to all personal property obtained by either person separately or jointly after marriage. In that agreement the Putnam Annuity Contract acquired during the marriage in his name, and the

Putnam Annuity Contract acquired in her name were each treated as marital assets. This conduct is wholly inconsistent with the language of paragraph 4 and 6 of the Antenuptial Agreement.

Consequently, because of this conduct, the 51 percent interest of John Geraffo in The Pizza Place of Bridgeport, Inc., purchased by the parties during the marriage (in 2001) with marital money should also be treated as a marital asset.

Moreover, it is important to note that Davali's LLC, dba. The Cool Spot, a business in which David Ware obtained a 50 percent partner ownership during the marriage, was acknowledged by him to be a marital asset. This business was started on March 28, 2001. It was not included in the accord reached by the parties in the Memorandum of Understanding, but Appellant embraced it as a marital asset during the trial. Appellant did not appeal the finding that it is marital by the Family Court in his subsequent Petition for Appeal to the Circuit Court of Harrison County. By this conduct, Appellant is estopped from asserting that an undivided interest in the businesses acquired during the marriage are not marital at this juncture, regardless of whether it is a pizza business or an ice cream business.

Therefore, the language in paragraphs 4 and 6 of the Antenuptial Agreement, which relate to personal property acquired by the parties, in each party's name after marriage, has by his own conduct, been waived by Respondent or he is estopped from stating otherwise at this juncture.

C.

THE LOWER COURT'S VALUE OF THE 51 PERCENT INTEREST IN THE PIZZA PLACE OF BRIDGEPORT, INC., ACQUIRED DURING THE MARRIAGE, IS SUPPORTED BY CREDIBLE EVIDENCE BECAUSE IT WAS CALCULATED BY A QUALIFIED EXPERT WHO APPLIED A WELL RECOGNIZED VALUATION METHODOLOGY TO VALUE THE CORPORATION AS WELL AS THE 51 PERCENT INTEREST THEREIN, AND THEREFORE SHOULD BE AFFIRMED.

Pursuant to the Decree of Divorce entered on October 24, 2006, a value of $345,000 was placed on The Pizza Place of Bridgeport, Inc., and this value was not set aside in the subsequent appeals. In adopting this value, the lower court accepted the valuation of Appellee's expert, Donald Conley, over Appellant's expert. Subsequently, in the "Order on Issues Remanded by Circuit Court, October 10, 2007," which was affirmed in the Final Order of the Circuit Court, Mr. Conley's value for the Pizza Place of Bridgeport, Inc., was again recognized as well as his valuation for the 51 percent interest in the Pizza Place of Bridgeport, Inc .in the amount of $92,373.75.

Appellant challenges this valuation asserting on appeal that the value of his expert should have been adopted. Appellant overlooks that the value of The Pizza Place of Bridgeport, Inc. is the value testified to by Appellee's expert, Donald Conley, at the hearing before the Family Court on December 7, 2007. He also overlooks Mr. Conley's basis for his opinion is that the 51 percent interest gives the buyer a controlling interest in the pizza business, and as such should be valued higher than an interest which does not give a controlling interest in the business. Mr. Conley recalled that the business does not own any real estate and leases its business location. Mr. Conley referenced IRS rulings that a controlling interest in a business carries a higher premium value than a non-controlling interest and, therefore, one does not depreciate a controlling interest. Mr. Conley concluded that a premium is warranted, as opposed to a straight mathematical calculation of 51 percent of the value of the total business entity. However, because the parties already had the 49 percent interest, he opined that the premium is worth only 5 percent. Mr. Conley confirmed his previous value of the business as a whole is $345,000, ignoring Appellant's unreported cash flow.

Neither the Circuit Court nor the Family Court Judge ignored the opinion of Appellant's expert, Micky Petitto. Appellant's expert's evaluation was considered and not accepted, with good

reason. Ms. Petitto attempted to revalue the business even though Mr. Conley's value of the business had already been accepted and not previously reversed on appeal. However, during the hearing on December 7, 2007, the Family Court permitted Ms. Petitto's testimony over the objection of Appellee. On cross-examination, Ms. Petitto admitted that many of her assumptions and opinions were based on valuing real estate, not a pizza business that owns no real estate. Specifically, on page 3 of her report in the second and third full paragraphs, she conceded her opinions relate to real estate, not a business, and that she had no authority to cite for her opinion in the fourth paragraph that an "undivided fractional interest in the property, whether it is 1% or 99% . . . is considered as a minority interest." In fact she recanted this opinion on page 4, and admitted a 51 percent interest in a business does give control over the business.

It was not error nor an abuse of discretion for the lower court to adopt Mr. Conley's opinions over that of Ms. Petitto, as the court compared the two experts' testimony and valuations and set forth its reasons as to why it found one more reliable than the other. The facts support that conclusion and were properly affirmed by the Circuit Court. *See Michael v. Michael*, 469 S.E.2d 14 (W.Va. 1994).

As to the applicability of the facts of the *Michael* case herein as a basis to reduce the value of the controlling interest in a corporation, Appellant overlooks that upon cross examination, Donald Conley stated that comparing *Michael* to the instant matter is like comparing "apples to oranges." Specifically, Mr. Conley noted that *Michael* involved a machine shop which is not analogous to a pizza business. He noted that contrary to a pizza business, a machine shop is highly specialized, requires operation by a person of special skills, and there is not a large market for it; moreover, a machine shop is tied to the coal industry and is dependent upon that highly volatile industry for its

income. The subject pizza corporation grew during the marriage, and it was Mr. Conley's recollection that growth did not occur in the machine shop case. He also noted there were Huntington Bank share stocks owned by the corporations in *Michael* which distinguished it from this case in that the pizza business owned no bank stock. Mr. Conley observed that there would be a capital gains impact if the stock were sold, which merited the reduction in value of the corporate interest addressed in that case.

For all of these reasons the lower court properly valued The Pizza Place of Bridgeport, Inc. and the 51 percent interest therein.

APPELLEE BRENDA WARE'S CROSS ASSIGNMENTS OF ERROR

I. PROCEDURAL AND FACTUAL HISTORY

Appellee Brenda Dianne Ware (hereinafter "Brenda") was born August 16, 1970. After she graduated from high school, she attended a two year training course to be an x-ray technologist. She worked at Fairmont General Hospital from 1991 to 1993.

Appellant David Gary Ware (hereinafter "Gary") was born August 19, 1965. He graduated from high school and developed a career of running pizza restaurants..

Brenda and Gary became involved and decided to live together in the Fall of 1991. At that time, Gary worked at a pizza restaurant at the Meadowbrook Mall in Bridgeport, West Virginia, for which he asserts he was a co-owner.

While Brenda and Gary lived together, they had separate bank accounts and did not buy any property together. They shared their cost of utilities and food. Periodically, Brenda would work at the pizza restaurant to help Gary. Eventually, they became engaged, planned a wedding and set the date for February 20, 1993.

The couple planned a cruise to St. Thomas and to be married there. Gary contacted an attorney, unbeknown to Brenda, to prepare an Antenuptial Agreement.

Approximately ten days before the wedding, Gary told Brenda to come to the restaurant after work to talk to someone and to sign some papers. (Tr. December 16, 2005, p. 40) She came as requested only to be confronted by Gary and an attorney, Keith Skeen, who had prepared an Antenuptial Agreement. (*Id.*) She was surprised, but read the document. She asked about the waiver of alimony paragraph as it pertained to her. Gary agreed it should be removed. Attorney Skeen admitted he had put it in at Gary's request. (*Id.*, p. 60)

Attorney Skeen took the document with him to revise it and they were to come to his office the next day to sign it.

According to Brenda, she was told there was no need for her to have her own attorney. (*Id.*, p. 39) Further she asserts Gary told her if she didn't sign it, he would not marry her. (*Id.*, p. 41)

There was no disclosure of assets or debts. (*Id.*, p. 39)

Brenda had already paid for her dress, and the arrangements for the cruise and the wedding were in place. She wanted to marry Gary, so she signed the agreement the next day even though she did not understand it. (*Id.*, pp. 42, 49-50, 54) She believed the word "franchise" as used in the agreement meant "like a McDonalds or something." (*Id.*, p. 41) Later Gary admitted to her there was no franchise and never had been. (*Id.*) According to Gary, the sole purpose for having the agreement prepared was to protect his interest in the pizza business, and it was not intended to apply to anything else acquired during the marriage. (*Id.*, pp. 6-7, 29)

After they married, Gary, Brenda and John Geraffo, started a subsidiary of a corporation known as The Pizza Place of Bridgeport, Inc. There is no documentation as to when Gary acquired

an interest in this corporation. He asserts he owned a 49 percent interest, when they married. They called the subsidiary "Sweets and Treats," and there is no dispute that it was recognized as Brenda's business. (*Id.*, pp. 22-24) She quit her job as an x-ray technologist at Fairmont General Hospital to run it. During this time, she gave birth to their first child, Megan, who was born June 14, 1997. At the end of five years, the lease in "Sweets and Treats" was up for renewal. Brenda was pregnant with their second child. Brenda, Gary and John agreed not to renew the lease. (*Id,* pp. 43-44)

At this point in time, Brenda became unemployed. She focused on being a homemaker and mother. She also worked periodically at the pizza restaurant for no pay, especially during the Christmas holidays when she would work as much as ten to twelve hours a day. (*Id.,* pp. 42-43)

In the Fall of 2004, Brenda started working part time at the hot lunch program for Christian Heritage Church where their children, Magen and Cody, were enrolled in school.

The parties had begun having problems in the marriage about four (4) years before they separated. She asserts he was verbally and physically abusive, even in the presence of the children. He also drank alcohol to excess almost nightly. He threatened to kill her if she left him. She offered to go to counseling with the church counselor, but he refused. So, she got counseling for herself. She also resumed competitive running, a sport she had enjoyed as a high school athlete. Gary objected to this and criticized her.

In 2001, the parties acquired a 50 percent interest in an ice cream business called Davali's LLC dba The Cool Spot, and a 51 percent interest in the Pizza Place of Bridgeport, Inc. During the marriage, there were many pizza corporations started by Gary and his partner such as: Primo Pizza of Sumter, South Carolina (at first Gary said "Pizza Place", but corrected himself) which was incorporated in 1993 or 1994 and dissolved about five years later. (*Id.,* pp. 15-17); Primo Pizza of

Greenwood, South Carolina which was incorporated in 1995 and dissolved about three years later (*Id.*, pp. 16-17); Primo Pizza of Florence, South Carolina which was incorporated in 1995 or 1996 (*Id.*, pp. 16-17), and Primo Pizza of Burlington, North Carolina which was incorporated in 1997 (*Id.*, p. 18)

Gary confirmed that he traded his interest in Primo Pizza of Florence and Primo Pizza of Burlington as part of the consideration for the 51% interest of his partner in The Pizza Place of Bridgeport, Inc. (*Id.*, pp. 18, 20)

He also confirmed that the reason the word "franchise" was used in the Antenuptial Agreement was because: "When we originally actually started in the pizza business my partner and I's idea was to set up a franchise program for many pizza places, but it just never ended up happening that way . . ." (*Id.*, p. 33)

In March of 2005, the parties were in the family vehicle and an argument ensued. Gary got out of the car and said he was done. They attempted to resume the marital relationship, but ultimately were not successful and separated permanently in August, 2005. The date of March 26, 2005 was the asserted date of separation by Brenda even though they were living separately at the last marital home when she filed for divorce.

Brenda filed for divorce on July 12, 2005, alleging cruelty and abandonment. Gary filed an answer denying all grounds of divorce and the date of separation. Because of a conflict, the Family Court Judge, M. Drew Crislip, recused himself, and Judge Jaymie Godwin Wilfong, Family Court Judge of Randolph County, was appointed to the case.

In December, 2005, Gary filed an Amended Answer and a Counter-Petition asserting the parties physically ceased living together on August 10, 2005. He asserted cruelty and that she was guilty of fault that substantially caused the breakdown of the marriage.

The parties acquired many assets during the marriage including the aforesaid ice cream business, the pizza business, and other assets such as the last marital home which was jointly titled; three vehicles, 1994 Ford Mustang, 1997 Chevy, and 1999 Suburban (jointly titled); a $19,800 annuity solely in Brenda's name; a $24,600 annuity solely in Gary's name; and various items of household furnishings and personal property. All of this (except the business) was allocated between the parties as marital assets in the Mediated Agreement dated October 15, 2005, without regard to how any of the assets were titled or any assertion of rights under the Antenuptial Agreement.

Because the applicability of the Antenuptial Agreement presented a threshold issue regarding the remaining asset, The Pizza Place of Bridgeport, Inc., a hearing was conducted by the Family Court on the 16th day of December, 2005.[2] During this hearing, it was clear that (A) no disclosure of assets or debts had been exchanged between the parties; (B) that Brenda had less than 24 hours from the time she saw the first draft of the agreement until she signed it on February 20, 1993, and (C) the parties were married ten days later, on February 21, 1993.

After hearing the evidence, the Family Court found and concluded the Antenuptial Agreement was void and unenforceable because there was no disclosure of assets and debts and because Brenda Ware did not have an opportunity to obtain independent counsel.

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Gary has never disputed that the interest acquired during the marriage in the ice cream business is marital, or should be assigned to him, perhaps because it had a negative value to reduce what he would owe Brenda in the equitable distribution.

At the final trial on August 4, 2006, the parties agreed on the grounds of irreconcilable differences as the grounds for divorce, but during the trial on August 4, 2006, Gary attempted to prove adultery (although he did not allege adultery) against Brenda. The Family Court found in the Decree of Divorce that he did not prove his allegation. This ruling was not appealed.

The Family Court also found that "Mr. Ware has likely substantial additional income unreported from which they all benefitted . . ." ("Decree of Divorce, " ¶ XIV, p. 4) This ruling was not appealed.

After the parties separated, Brenda resumed her employment as an x-ray technologist by taking part-time employment as it was offered to her. This meant odd, unpredictable hours of working which were difficult for her to juggle and provide for their three young children. The Family Court found that from this employment, she grossed $3,100 per month. The Family Court used Gary's income at $4,000 gross per month finding that Gary could "be earning more" in that the parties received $35,000 to $40,000 annual cash income from the pizza business" (*Id.*,¶ XIV, p. 4) However, no other income was attributed to him.

The Family Court adopted the valuation of Donald R. Conley for the corporation, The Pizza Place of Bridgeport, Inc. Even though no stock certificates or tax returns or other indicia of ownership was produced by Gary Ware, the Court found that he owned a 49 percent interest in the corporation as of the date of marriage. The Court applied the analysis in *Mayhew v Mayhew*, 519 S.E.2d 188 (W.Va. 1999). The Court valued the marital equity to be $322,200 and assigned it to Gary. (*Id.*, ¶ XVI, p. 14)

The Family Court concluded that, after all assets and debts were assigned, Brenda was owed $200,681.62 to equalize the allocation, and awarded her a judgment. (*Id.)*

However, the Family Court barred Brenda from spousal support and no attorney's fees or expert fees were awarded to her.

Gary appealed the "Decree of Divorce," entered on October 24, 2006, and the Circuit Court of Harrison County, Judge James A. Matish presiding, reversed the Family Court's Order, finding that the Antenuptial Agreement was valid and enforceable. Appellee refers this Court to Appellant's recitation in the "Kind of Proceeding and Nature of Ruling in Circuit Court"of his Brief regarding the ensuing two orders of remand and two subsequent appeals.

Gary appealed the Final Order of the Circuit Court of Harrison County, entered April 9, 2008, to the Supreme Court of Appeals of West Virginia. Brenda filed no response to his Petition for Appeal because of financial concerns. Now that this Court has accepted the case on the merits, Brenda submits herein her responsive Brief and Cross Assignments of Error.

II. CROSS ASSIGNMENTS OF ERROR

The Circuit Court of Harrison County committed reversible error, as follows:

A. In reversing the Family Court's finding and conclusion that the Antenuptial Agreement was invalid;

B. In failing to identify and value the increase in value of Appellant's interest, if any, in The Pizza Place of Bridgeport, Inc. from the date of marriage to the date of separation, assuming *arguendo* that the Antenuptial Agreement is valid;

C. In denying an award of expert fees, costs and attorney fees, and

D. In denying Appellee's request for spousal support of $1,200 per month, in that she is at a clear financial disadvantage due to Appellant's retention of exclusive use of The Pizza Place of Bridgeport, Inc. *pendente lite* and post-decree.

III. ARGUMENT

A. THE CIRCUIT COURT OF HARRISON COUNTY ERRED IN REVERSING THE FAMILY COURT'S INITIAL FINDING THAT THE PARTIES' ANTENUPTIAL AGREEMENT WAS UNENFORCEABLE

Appellee Brenda Ware asserts that the parties' Antenuptial Agreement, dated February 11, 1993, is invalid for the following reasons:

(1) No Disclosure of Assets: The Antenuptial Agreement is invalid because full or even a general disclosure of each party's assets did not occur before they signed the agreement. For an antenuptial agreement to be valid, it has to be "substantively fair, entered in full disclosure and deliberation by both parties, and so on." *Bridgeman v. Bridgeman*, 391 S.E. 2d 367, 370 (W. Va. 1990). There is no dispute that there was no disclosure prior to the signing of the agreement. The actual interest allegedly owned by Appellant in the "Pizza Place franchise" is not stated in the agreement, nor valued in the agreement. In reality there was no franchise, but one was planned to be developed in the future. Appellant admits that he and his partner never established a franchise. If Appellant owned an interest in The Pizza Place of Bridgeport, Inc, it was not disclosed, not valued, and not mentioned in the agreement.

(2) Appellee had no opportunity to seek independent counsel: Appellant had a right to review the Antenuptial Agreement with an independent attorney of her own choice. She was not advised of that right. Even if she were advised of that right, she had less than 24 hours to act on that right, assuming she had funds to hire an attorney. Her lack of independent advice renders the contract invalid because she could not enter into it knowingly or voluntarily after deliberation. *See Bridgeman, supra*; *Gant v. Gant*, 329 S.E. 2d 106 (W. Va. 1985).

In California, the opportunity to seek counsel in regard to prenuptial agreements has been defined and certain conditions must be met for a premarital agreement to be enforceable as follows:

- The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.

- The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.

- The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and the party was proficient in the language in which the explanation of the party's rights and obligations relinquished was in writing and was delivered to the party prior to signing the agreement. The unrepresented party executed a document declaring that he or she received the information and indicating who provided that information.

- The agreement was not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.

- The party against whom enforcement is sought was provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party, unless that party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, or that the party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

See California Family Code § 1615

In South Carolina, whether or not a party obtained legal counsel was significant in evaluating whether a prenuptial agreement was voluntary and understandingly made. *Holler v. Holler*, 612 S.E.2d. 469, 476 (S.C. App. 2005).

Appellee clearly had no opportunity to seek independent counsel in a temporal sense, nor was she financially able to do so. For these reasons the Antenuptial Agreement was properly not enforced by the Family Court.

(3) Appellee was told she had to sign the agreement or there would be no marriage. The formation of the Antenuptial Agreement was not a mutual decision by a young couple prior to marriage. It was a demand by Appellant nine days before their wedding was to take place in St. Thomas, U.S. Virgin Islands. Appellee did not believe she had a choice at that late date. She had already purchased her dress and arranged for their cruise. Clearly this constitutes duress which rendered her acquiescence less than voluntary to the agreement. Duress is defined as the application of undue pressure in a contractual bargaining process through the use of improper threats. *King v. Donnkenny Inc.* 84 F. Supp. 2d 736, 738 (W. D. Va. 2000). Actually, there wasn't even a "bargaining process" for Appellee. She was presented with a contract prepared by Appellant's attorney and told to sign it. She felt she had no choice. She loved Appellant and had committed to be married. So she signed the agreement. For this reason, in addition to the others herein assigned, the Antenuptial Agreement should not be enforced in the divorce case.

(4) The language in the Antenuptial Agreement is inadequate to preclude marital assets from equitable distribution: The Antenuptial Agreement is invalid as to the marital assets because it does not address marital property. West Virginia law requires that marital property shall be divided equally between the parties. *See* West Virginia Code § 48-7-101. There is no language in the agreement that expressly addresses how assets acquired after marriage by marital money or by work efforts shall be treated in the event of a divorce. Therefore, the contract should not be applied to avoid equitable distribution of the marital assets.

(5) There is no "Pizza Place franchise" as referenced in paragraph 2 of the Antenuptial Agreement: The parties' 2003 tax returns reflect that there is a corporation whose complete name is The Pizza Place of Bridgeport, Inc. It is an "S" corporation, and an interest in it was clearly

purchased by the parties during the marriage in 2001. The 2004 tax return reflects another business had been started called The Pizza Place of Beckley. It, too, is stated to be an "S" corporation. Appellant dissolved that corporation *pendente lite*. Another business on the tax returns called "Davali's LLC dba The Cool Spot" was treated as marital. The parties acquired a 50 percent interest in Davali's during the marriage. It was assigned to Appellant. There are no records or documents that establish the existence of a franchise when the parties separated in 2005.

The Antenuptial Agreement addresses Appellant's undefined interest in a "franchise" as of the date of February 11, 1993. There is no reference to any corporations, let alone franchise agreements. The reality is that it is unrebutted that there was no franchise in existence on February 11, 1993, and none was thereafter created. Because the use of the word "franchise" is clear and unambiguous, there is no basis to "construe" it or to consider parole evidence to interpret it. *See Bittorf v. Bittorf*, 390 S.E.2d 793 (W.Va. 1989)

Moreover, simply because the parties disagree as to the meaning of the language of the agreement does not mean it is ambiguous. *Orteza v. Monongalia County General Hospital*, 318 S.E. 2d 40, 43 (W.Va. 1984).

Finally, Appellant's attorney prepared this agreement. (Tr. December 16, 2005, p. 58) If such an agreement contains error, is confusing, misleading or wrong, it should construed against Appellant, not Appellee. Michie's Jurisprudence (Vol. 4A), Contracts, § 44 (1999 Repl.Vol.) Thus, if there is uncertainty, it should be construed against Appellant.

(6) Because the parties' circumstances have changed significantly during the marriage it is not fair to enforce the agreement in the divorce. In *Gant v. Gant*, 329 S.E.2d 106 (W.Va. 1985), this Court set forth a detailed analysis to determine the validity of prenuptial agreements that establish

property rights at the time of divorce. In *Gant*, the Court recognized that prenuptial agreements between middle aged couples who bargain and contract to protect their assets if things did not work out romantically was enforceable because they foresaw what might transpire. (*Id.* at 114-115) However, the facts in the case *sub judice* are not analogous to the *Gant* middle-aged couple who were married for a brief time.

The *Gant* Court queried: "[w]hat would our decision be in this case if Elana and Larry had had an idyllic relationship for five years and had decided to have three children? Certainly that was not a foreseen event . . ." (*Id* at 115)

The instant matter is clearly an example of the young couple who marry but to whom there were many unforeseen events that occurred thereafter over twelve years of time which render the Antenuptial Agreement unfair to enforce at the time of the divorce, as follows:

A. After the parties were married, Appellee gave up her career at Fairmont General Hospital in the summer of 1993, to run "Sweets and Treats" a new subsidiary of The Pizza Place of Bridgeport, Inc., which business was considered to be "hers" by Appellant and his partner, John Geraffo. She ran the business for the next five years until they mutually agreed not to renew the lease.

B. Appellee gave birth to three children during the marriage, namely: Megan who was born June 14, 1997; Cody who was born June 20, 1999; and Madison who was born January 3, 2002.

C. Investment assets were acquired, including a Putnam Annuity in Appellant's name, and a Putnam Annuity in Appellee's name.

D. Many new corporations were started by Appellant during the marriage in other states which were traded off during the marriage as part of the consideration to acquire John Geraffo's 51

percent interest in The Pizza Place of Bridgeport, Inc. Also, the parties borrowed money using the equity in their home to finance this acquisition.

E. A 50 percent interest in a business named Davali's (dba The Cool Spot) was acquired.

Recent case law in other jurisdictions have adopted the analysis of whether or not there has been a change in the facts and circumstances from the date the prenuptial agreement was executed to the date of separation which make its enforcement unfair – a principle that this Court is urged to apply herein. *See Holler v. Holler*, 612 S.E.2d 469, 474 (S.C. App. 2005) and *Crews v. Crews*, 945 A.2d 502 (Conn. App. 2008).

B. BECAUSE THE ANTENUPTIAL AGREEMENT, EVEN IF VALID, DOES NOT APPLY TO THE PIZZA PLACE OF BRIDGEPORT, INC., THE CIRCUIT COURT ERRED WHEN IT FAILED TO IDENTIFY AND VALUE THE INCREASE IN VALUE OF APPELLANT'S INTEREST (IF ANY) IN THE PIZZA PLACE OF BRIDGEPORT, INC. FROM THE DATE OF MARRIAGE TO THE DATE OF SEPARATION.

In the Decree of Divorce, entered October 24, 2006, the Family Court incorporated by reference its prior ruling, entered January 31, 2006, which set aside the Antenuptial Agreement as invalid and found that Appellant's ownership interest in The Pizza Place of Bridgeport, Inc., as of the date of marriage, was 49 percent. (*See* Decree of Divorce, ¶ XX, p. 15) After the parties married the other 51 percent was acquired. The Family Court followed the steps as required in *Mayhew v. Mayhew*, 519 S.E.2d 188 (W.Va.1999) and placed a value on all the marital equity in the corporation.

Appellee does not overlook that there was and is no documentation to support the assertion by Appellant that he had acquired a 49 percent interest in The Pizza Place of Bridgeport, Inc. before they were married. The value placed on the entire business by Appellant, as of the date of marriage

of $22,800, was utilized only because it was a value suggested by Appellant's expert in the absence of any tax returns or other documentation and was not of large significance given that the court accepted Appellee's expert's value of the business on the date of separation of $345,000.

The Circuit Court, in its first Order of Remand entered March 22, 2007, concluded that the Family Court erred when it invalidated the Antenuptial Agreement. The Circuit Court remanded the issue as to the 51 percent interest in The Pizza Place of Bridgeport, Inc. and "whether or not Ms. Ware is entitled to any increase that may have occurred during the marriage in the 49% interest that Mr. Ware owned in the business prior to the marriage." (*See* "Order Granting Petition for Appeal and Cross Petition, and Reversing and Remanding Case to Family Court," March 22, 2007, p. 7)

The Family Court then entered an "Order on Issues Remanded by the Circuit Court," on July 3, 2007, in which Appellee was denied an award of any value in The Pizza Place of Bridgeport, Inc., and was denied any award of spousal support, attorney fees, and expert fees.

Appellee Ware appealed this order to the Circuit Court who accepted the appeal.

In a second order of remand entered by the Circuit Court on October 10, 2007, the Circuit Court affirmed the Family Court's ruling that the Antenuptial Agreement operated to preclude Appellee from any claim in the 49 percent interest in The Pizza Place of Bridgeport, Inc. because she "waived" it, but reversed the Family Court and remanded the case again as to the value of the 51 percent interest acquired during the marriage. The Circuit Court also affirmed the denial of spousal support, but reversed and remanded the issue as to Appellee's request for attorney's fees and expert fees.

Without waiving her argument that the Antenuptial Agreement is unenforceable, Appellee asserts that, even if the Antenuptial Agreement is deemed by this Court to be enforceable, it should

not be applied to bar her from the marital equity in the alleged 49 percent interest owned by Appellant on the date of marriage created by the increase in value of The Pizza Place of Bridgeport, Inc. from the date of marriage to the date of separation, for the following reasons:

1. Paragraph 2 of the Antenuptial Agreement only refers to a "Pizza Place franchise" to which Appellee released "all rights she could or might have, by reason of marriage, in the Pizza Place franchise located at the Meadowbrook Mall, Bridgeport, Harrison County, West Virginia, as well as any future acquisitions of Pizza Place franchises."

2. The word "franchise" was expressly requested by Appellant, and placed in the Antenuptial Agreement by attorney Skeen when he drafted it.

3. It is undisputed, that no franchise existed at the time of the making of the Antenuptial Agreement, nor were any thereafter acquired.

4. The word franchise is not ambiguous.

5. There is no mention in the Antenuptial Agreement of Appellant owning any interest in any corporations let alone a corporation known as The Pizza Place of Bridgeport, Inc.

6. The Pizza Place of Bridgeport, Inc. was incorporated June 7, 1991, by John Geraffo. There are no stock certificates to show ownership at any relevant point in time for the case at bar.

7. There are no tax returns, nor K-1's, nor financial disclosure for 1993, to support Appellant's assertion that he owned any interest in The Pizza Place of Bridgeport, Inc. prior to his marriage, or the value of said interest.

8. The Circuit Court of Harrison County recognized in its second remand Order entered October 10, 2007, that "the West Virginia Supreme Court of Appeals has held that '[W]here the language of a contract is clear the language cannot be construed and must be given effect and no

interpretation thereof is permissible.' Syl. Pt. 2, *Berkeley County Pub. Serv. Dist. v. Vitro Corp.*, 152 W.Va. 252, 162 S.E.2d 189 (1968)."

However, without any justification, the Circuit Court ignored the law; ignored the repeated use of the language "franchise" and proceeded to "construe" what the "Business paragraph of the Agreement contemplated..." (Order p. 4)

There is no basis in law or equity to interpret or construe the "Business paragraph of the Agreement," because it is clear and unambiguous. Both parties understood the word "franchise," which was intentionally placed in the agreement by attorney Skeen who stated he was requested to use that word by Appellant.

Because the use of the word franchise in the agreement is clear and unambiguous, and because no franchise actually existed (but was contemplated to be created in the future), and because Appellant expressly wanted that word to protect his future plans to develop a franchise, it is neither fair nor equitable nor proper in law to construe the agreement against Appellee simply because Appellant failed to develop any franchise.

This leaves only the question as to whether Appellant even owned any interest in the corporation The Pizza Place of Bridgeport, Inc. on February 11, 1993. Assuming *arguendo* that Appellant did own a 49 percent interest in the corporation as he asserts, Appellee is entitled under West Virginia Code § 48-1-233(2) to her share of the marital equity created by the increase in value of this asset due to the investment of marital money and/or the parties' work effort during coverture, all as originally found and concluded by the Family Court in the Decree of Divorce.

C. BECAUSE APPELLEE BRENDA WARE'S EXPERT'S OPINIONS WERE CONSISTENTLY ADOPTED BY THE LOWER COURTS, AND BECAUSE OF THE SIGNIFICANT LITIGATION GENERATED IN THE CASE, UNDER *BANKER V. BANKER* IT WAS ERROR FOR THE LOWER TRIBUNALS TO DENY APPELLEE'S REQUEST FOR AN AWARD OF EXPERT FEES, COSTS, AND ATTORNEY'S FEES.

This case comes to the Supreme Court of Appeals of West Virginia after the parties were involved in protracted litigation of the issues of the validity of the Antenuptial Agreement; child support; spousal support; expert fees and attorney's fees. They were able to settle a portion of the issues as to equitable distribution regarding all assets except The Pizza Place of Bridgeport, Inc. and Davali's (dba The Cool Spot). This settlement was set forth in a written accord titled "Memorandum of Understanding" which was reached with the assistance of a mediator and the presence of the parties' attorneys.

The first hearing before Family Court Judge Wilfong on the Antenuptial Agreement was held in Clarksburg, West Virginia and all subsequent hearings were conducted before her in Elkins, West Virginia, including the two hearings following the orders of remand from the Circuit Court.

During the entire duration, Appellant has continued to have the exclusive use and benefit of the income of The Pizza Place of Bridgeport, Inc.

Pursuant to the Decree of Divorce: (a) Appellant's reported monthly income is $4000 per month but he could adjust his schedule to "be earning more" and "[i]t is uncontested that Mr. Ware received, and the parties received during their marriage, an annual amount of cash income from the pizza business in amounts as much as $35,000.00 to $40,000.00." (Decree of Divorce, ¶ XIV, pp. 3-4); (b) the valuation of The Pizza Place of Bridgeport, Inc. by Appellee's expert "did not consider cash money not reported to the IRS, although that was alleged and never denied." (*Id.* ¶ XVI, p. 10); (c) Appellee's income was determined to be $3,100 per month (¶ XIV, p. 3).

Appellant's expert, Mickey Petitto, testified on December 7, 2007 that she noted a decrease of the net income of The Pizza Place of Bridgeport, Inc. in 2005 "due to legal expenses." (Tr. December 7, 2007, p. 72) There is no evidence that the pizza corporation incurred any legal fees as a part of its regular operation.

The case involved three appeals to the Circuit Court of Harrison County and two orders of remand before a final appealable order was entered.

West Virginia Code § 48-5-611 clearly authorizes courts to award attorney's fees and court costs. Reimbursement for reasonable expert witness fees is permissible under consideration of similar financial factors and conditions as are used in awarding attorney's fees. Syl. Pt. 15, *Bettinger* v. *Bettinger*, 396 S.E.2d 709 (W.Va. 1990). Further, as to attorney's fees this Court has ruled:

> In divorce actions, an award of attorney's fees rests initially within the sound discretion of the family law master and should not be disturbed on appeal absent an abuse of discretion. In determining whether to award attorney's fees, the family law master should consider a wide array of factors including the party's ability to pay his or own fee, the beneficial results obtained by the attorney, the parties' respective financial conditions, the effect of the attorney's fees on each party's standard of living, the degree of fault of either party making the divorce action necessary, and the reasonableness of the attorney's fee request.

Syl. Pt. 4, *Banker v. Banker*, 196 W.Va. 535, 474 S.E.2d 465 (1996).

In this case, the Family Court originally denied Appellant and Appellee any award of attorney's fees or expert fees in the Decree of Divorce, entered Order 24, 2006. There was no explanation given. Appellee repeatedly raised this issue in her subsequent cross-petition of appeal, and petitions for appeal to the Circuit Court, to no avail. [3]

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[3] Efforts by Appellee to collect on the judgment of $97,631.88 awarded to her in the Final Order entered April 9, 2008 have been thwarted. On July 9, 2008, she caused a suggestion of personal property and a summons was to issue. This caused a freeze of Appellant's bank account at Branch Banking and Trust Company (BB&T) containing $3,613.94.

A review of the case pleadings, including appeals, confirms that in Appellee's last cross-petition for appeal served February 1, 2008, she set forth that her attorney's fees totaled $21,240.70 and referenced a detailed exhibit she had submitted to the Court. She also requested her expert fees of $3,100 in the divorce action and additional fees of $600 for the remand issues litigated on December 7, 2007, for a total of $3,700.

It is clear from a review of the entire record that Appellant's "ability" to pay his attorney's and expert fees far exceed that of Appellee mainly because he retained the proverbial "cash cow," namely The Pizza Place of Bridgeport, Inc., from which he could draw up to $35,000 cash, in addition to his salary, and through which he appears to have run his legal expenses (according to his expert Mickey Petitto). Thus, Appellant's financial condition and standard of living was not nearly as adversely impacted as that of Appellee who had no resources except her salary. Her living expenses which averaged $5,256 clearly consumed all her income. (See Pet. Ex. Monthly Expenses - Brenda Ware filed August 26, 2005)

The court's assessment of the fault was in essence a draw, with fault placed equally on both of the parties.

The opinions of Appellee's experts were consistently adopted by the court, but the expenses incurred by Appellee in presenting the experts were ignored.

(Footnote No. 3 continued from previous page) On July 16, 2008, Appellant filed his petition for appeal to the West Virginia Supreme Court. He also filed a motion for a stay with the Circuit Court of Harrison County. Appellee filed an objection to the stay and asked for her attorney's fees. By order entered July 23, 2008, the Circuit Court denied the motion for a stay and denied Appellee's motion for attorney's fees.

By operation of a subsequent "Order to Disburse Funds Held by Suggestee" entered October 10, 2008, the Circuit Court required BB&T to issue a check to Appellee for $3,613.94 and deliver it to Appellee's counsel who was required to deposit said money into an interest bearing account with Appellee and her attorney as "co-owner, trustee," pending final ruling by the Supreme Court of Appeals of West Virginia on the pending matter.

It is the Appellee who has gone to the recent expense to produce transcripts of the hearings held on October 10, 2006 and December 7, 2007, in the course of this Appeal. She now incurs significant expense in this appeal.

Both lower courts have failed to consider the great economic advantage that Appellant has had and continues to have since the petition was filed on July 12, 2005 due to Appellant's exclusive operation of The Pizza Place of Bridgeport, Inc. Appellant has a war chest, in essence, that arguably equally belongs to Appellee but to which she has no access. Even if the Final Order of the lower court is affirmed, Appellee will lose over one- third of the judgment awarded her to for her fees and costs, while Appellant retains the asset worth at least $345,000 and through which he was far better able to manage his costs *pendente lite.*

For these reasons, Appellee should be granted a judgment for all her attorney's fees (including appellate litigation to this Court) costs for transcripts, and the expert's fees, in addition to the relief she seeks on the other issues before the Court.

D. BECAUSE APPELLEE WARE IS AT A CLEAR FINANCIAL DISADVANTAGE TO APPELLANT, WHO RETAINED THE EXCLUSIVE USE OF THE PIZZA PLACE OF BRIDGEPORT, INC. *PENDENT LITE* AND POST DECREE, IT WAS ERROR TO DENY APPELLEE'S REQUEST FOR SPOUSAL SUPPORT OF $1,200 PER MONTH TO ASSIST HER UNTIL SHE COULD REBUILD HER INCOME TO BE ABLE TO ENJOY A STANDARD OF LIVING SHE HAD BEFORE THE PARTIES SEPARATED.

Appellee has requested that she be awarded rehabilitative support to enable her to rebuild her income earning ability. This has been denied. She initially requested $1,200 per month for three years. This reasonable request was denied by the Family Court in the Decree of Divorce and ultimately the denial was affirmed (after two remands to reconsider) by the Circuit Court.

There is a valid basis for Appellee's request for rehabilitative support that was never really been assessed by the Circuit Court which kept remanding the issue to the Family Court for reconsideration.

At the age of 22, Appellee abandoned her career as an x-ray technologist a few months after she and Appellant married because she began running a subsidiary of the corporation The Pizza Place of Bridgeport, Inc., named "Sweets and Treats." She ran this business from 1993 to 1998 when she, her husband, and the partner John Geraffo agreed it was not worthwhile to renew the lease.

She continued thereafter to help periodically at The Pizza Place of Bridgeport, Inc. It is not disputed that she was, after 1998, basically a "stay at home" mom who had given birth to the parties' first child in 1997 and had two more children after "Sweets and Treats" was shut down.

After the two older children were in school at the Christian Heritage Academy, Appellee also helped out at the school. Specifically, Appellee was a part-time assistant for the school lunch program to offset the children's school expenses.

When the parties separated, Appellee applied for work in the field for which she had trained over 14 years previously.

The running of the family pizza business had proved lucrative to the parties and the children, such that they took vacations, lived in a nice home, had four cars and put their children in a private school. The parties' income sources were inclusive of unreported cash of a range of $35,000 to $40,000 per year.

After the parties separated, Appellant continued to run the pizza restaurant and retain all the income. During the pendency of the action, Appellee lived in the marital home with the children.

Appellant paid child support and, pursuant to the Order *Pendente Lite* was ordered to pay for the loan payments on the last marital home, the children's tuition, and the utilities at the last marital home. Further, Appellant was allowed to exercise his alternate weekend parenting time at the house, so this put a burden on Appellee to find other shelter on alternate weekends.

In the Decree of Divorce entered December 24, 2006, Appellee was awarded a significant judgment in the amount of $200,681.62, mainly due to her marital interest in The Pizza Place of Bridgeport, Inc. However, that ruling has long since been reversed, and Appellee had only a small amount of money paid to her to equalize the other assets ($39,581.62).

Meanwhile, Appellant continues to have the full use and benefit of The Pizza Place of Bridgeport, Inc.. Therefore his standard of living is not compromised as the case starts into its fourth year of litigation.

Even if Appellee's judgment from the Decree of Divorce is reinstated retroactively, then she still needs spousal support to assist her to meet her expenses until she is paid by Appellant. She had originally asked for a support award for a period of three years, but it has been 2 ½ years since the Decree of Divorce was entered. Appellee has struggled to survive under the seemingly incessant trips to Family Court then Circuit Court and back to Family Court.

If the purpose of a divorce is to disentangle the parties as quickly as possible as stated in *Cross v. Cross*, 363 S.E.2d 449, 455 (W.Va. 1987), then that purpose has not been served in this case. Worse, Appellee's financial picture has suffered because she cannot meet her reasonable standard of living for herself and three children, let alone pay the expenses involved in this prolonged litigation. Even if she prevails on equitable distribution issues, her financial need still continues until she is paid.

Appellee Brenda Ware fears and apprehends that Appellant will not pay her even if she prevails in this (hopefully) final appellate process. Therefore, she prays that she be awarded spousal support in the amount of $1,200 per month retroactive to November 1, 2006 and to continue, or until the judgment is paid in full.

IV. CONCLUSION

Therefore, based on the arguments and authorities set forth above, Appellee Brenda Diane Ware respectfully requests that the relief requested in Appellant's appeal be denied and that Appellee's Cross Assignments of Error be granted by this Court.

ATTORNEY'S CERTIFICATE PURSUANT TO WEST VIRGINIA RULE OF APPELLATE PROCEDURE 4A(c)

Now comes Delby B. Pool, attorney for Appellee Brenda Diane Ware, who certifies that:

(1) There is no recorded record of the final hearing held on August 4, 2005, and therefore, no transcript can be prepared, and

(2) The facts alleged as to the testimony of the Appellee and Appellant at that hearing are faithfully represented and are accurately presented to the best of her ability.

Given this 1 day of June, 2009.

BRENDA DIANNE WARE,
Appellee, By Counsel

Delby B. Pool

Delby B. Pool, Esq. (State Bar 2938)
Amy L. Lanham, Esq. (State Bar 8568)
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230 Court Street
Clarksburg, West Virginia 26301
(304) 623-9711
Counsel for Appellee

CERTIFICATE OF SERVICE

I, Delby B. Pool, Esquire, counsel for Petitioner Below, Appellee, Brenda Dianne Ware, do hereby certify that a true copy of the foregoing Brief of Appellee; Omissions or Inaccuracies in Appellant's Statement of the Case was served upon David Gary Ware, Respondent Below, Appellant herein, by and through his attorney, Douglas A. Cornelius, Esquire, by the following method:

_X_ United States mail, postage prepaid

____ Certified mail, return receipt requested

____ Hand delivered

____ FAX

____ Credible Person Service/Private Process Server

and I further certify that service was made this _1st_ day of June, 2009, at the following address:

P.O. Box 4424
Clarksburg, WV 26302-4424

DELBY B. POOL, ESQUIRE
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